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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1998

FULL GOSPEL TABERNACLE and JORGE VEGA,
Pastor of Full Gospel Tabernacle,

Petitioners,

- v. -

COMMUNITY SCHOOL DISTRICT NO. 27, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-QUESTION PRESENTED

Whether a public school district which has opened its school buildings to certain after-hour uses enumerated in State law is constitutionally required to rent its facilities to a church for regularly scheduled religious worship services?

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STATEMENT OF THE CASE

Petitioners Full Gospel Tabernacle, a Christian Church, and its pastor, Robert Castro (collectively, "the Church") commenced this action seeking declaratory and injunctive relief against respondents Community School District No. 27 (the "District"), the Board of Education of the City of New York (the "Board"), and various employees, officers and members of the board of the District. The Church alleges that the District denied it the use of Public School 105 ("P.S. 105") for religious worship services and that this denial was made pursuant to the Board's Standard Operating Procedures and section 414 of the New York State Education Law, upon which those procedures are based. The Church argues that section 414 and the Board's operating procedures, insofar as they prohibit the Church from conducting weekly church worship services on public school property, violate the Free Speech, Free Exercise and Establishment Clauses of the First Amendment, and the Equal Protection Clause of the Fourteenth Amendment.

As framed by petitioners, the issue presented here is identical to that raised in Bronx Household of Faith v. Board of Education, 127 F.3d 207 (2d Cir. 1997), cert. denied, 118 S.Ct. 1517 (1998). For the same reasons that this Court denied certiorari in that case, the Court should deny certiorari here as well. Simply put, a State should have the power to prohibit its school districts from renting its elementary school buildings to outside organizations for the purpose of conducting religious worship services.

The Parties

The District has a student population of over 33,000 students attending pre-kindergarten through eighth grade in its

35 public schools (JA412, ¶¶ 12, 14).[1] P.S. 105 is located in the District and has students attending kindergarten through sixth grade, ranging from three to eleven years of age (JA412, ¶¶ 14, 15). Both the District and its officers are obligated to follow the Board's operating procedures.

Petitioner Full Gospel Tabernacle is a Christian Church located in Far Rockaway, Queens (JA11, ¶ 9). Members of the Church have children attending schools within the confines of the District, including P.S. 105 (JA413, ¶ 22). There are also members of the Church who are teachers in the school (JA413, ¶ 23).

The Dispute

The Church alleges that on April 25, 1994, it requested permission to rent P.S. 105 for worship services for four Sundays in June 1994 (JA15-16, ¶¶ 34, 40). These services were to include prayer, music, religious instruction, Christian testimony and fundraising (JA17, ¶ 43). On May 2, 1994, the Church was informed by Sheila McElhatten, a secretary in the District office, that their permit request was denied because of the Board's policy prohibiting the use of school facilities for religious worship services (JA15, ¶35). When Pastor Castro told Ms. McElhatten that recent Supreme Court rulings required the District to grant the Church's permit, Ms. McElhatten agreed to send the Church a permit application (JA15-16, ¶ 36-39). The Church's written request for a permit was thereafter denied by letter from Deputy Superintendent

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[1] Numbers in parentheses preceded by a "JA" refer to pages in the Joint Appendix submitted to the Court of Appeals. Numbers in parentheses preceded by "App." refer to the Appendix to the Petition for Writ of Certiorari.

Kenneth Grover, who explained that the requested use was not permitted by the Board regulations (JA40).

On May 27, 1994, the Church again requested permission to rent P.S. 105 for worship services on Sundays during the month of July 1994 (JA17, ¶ 44). The District again denied the Church's application (JA17, ¶ 45).

Statutory and Regulatory Framework

New York Education Law section 414 governs the use of public school facilities by non-school groups during non-school hours. The statute, the relevant provisions of which have been in effect since 1910, sets forth a list of uses which a local school district may permit in their facilities during such hours. While not expressly excluded by the statute, religious worship and instruction have been held by New York State courts and by the Court of Appeals for the Second Circuit not to be among the enumerated permissible uses.

The Board has promulgated standards which govern the use of City public school facilities in compliance with section 414. The Standard Operating Procedures Manual ("SOPM") published by the Board includes a chapter entitled "Extended Use of School Buildings" (JA350-51). Topic 5 of that chapter sets forth "Regulations Governing the Extended Use of School Facilities" which in large part tracks the language of section 414 in listing permissible uses of the school facilities. Id. The SOPM also contains a catch-all provision in section 5.6.6, which provides that school premises may be used "for such other purposes as may be authorized by law" (JA350). Since section 414 establishes those "purposes [which are] authorized by law," this catch-all provision renders the District's operating procedures coextensive with section 414.

Consistent with the interpretation of section 414 given by the courts, SOPM section 5.9 states that religious worship services are not an authorized use of school facilities (JA351). In an effort to implement this Court's decision in Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993), section 5.9 does permit "the use of school premises by outside organizations . . . for the purpose of discussing religious material or material which contains a religious viewpoint." Id.

Prior District Procedures for After-School Use of Buildings

Prior to September 1994, permit applications for the after-school use of District buildings were first reviewed by the individual school's custodian and principal (JA342, ¶9). Applications were then forwarded to central district office, where the application was reviewed by a secretary, Sheila McElhatten (JA342, ¶11). During this period, some permits were granted even though they failed to describe the activity to be engaged in by the applying organization (JA342, ¶12).

Evidence was presented that three groups had used District facilities for religious purposes prior to November 1994. In November 1992, the Salvation Tabernacle Church had requested permission to hold a "sacred concert" in a public school in the District (JA138). The concert included short opening and closing prayers and two and three-quarter hours of gospel music (JA147). This permit was granted.

A second church, the Jesus Family Fellowship, made two separate applications to use school facilities in the District for religious worship services in July and August 1994 (JA229). After discussions with the applicants and a review of the advertising flyers for the event, the school custodian and

the District secretary, Ms. McElhatten, granted the permit for July, mistakenly relying upon the second sentence in SOPM 5.9 which permits the use of school facilities "for the purpose of discussing religious material" (JA282-89). On July 21, 1994, after District Deputy Supervisor Kenneth Grover became aware of the inappropriate use of the facilities, the permit for the remainder of July was rescinded, and the permit application for August was returned (JA298, JA314). Before their permit was rescinded, the Jesus Family Fellowship conducted five religious worship services on District property (JA231, JA265).

District facilities were also used by a third group, the Deliverance Temple Church, for two Halloween parties in October 1993 and October 1994, and a series of bible study meetings from November 1993 to November 1994 (JA166-68, 171). Apart from the permit application for the first Halloween party (JA206), the church left blank the space marked "Description of Activities to be Conducted" in every permit application (JA199-220). The church's pastor, Rita Speller, does not remember anyone ever asking her what the church was going to use the facilities for after the first Halloween party (JA179). The church stopped using District facilities in November 1994, when the District became aware that the church was conducting worship services on school property in violation of State law (JA183).

Revised District Procedures for After-School Use of Buildings

In March 1994, shortly before the Church submitted its application, a new District Supervisor, Brenda Isaacs, and a new Deputy District Supervisor, Kenneth Grover, were appointed to administer the District (JA343, ¶17). Early in his tenure, Grover discovered flaws in the process for granting

permits to outside organizations (JA414). For example, he discovered that permits had been granted which contained no description of the events to be conducted. Id. As a temporary measure, Mr. Grover directed Ms. McElhatten to forward any unusual permit application to him for approval. Id.

In September 1994, Sandy Brawer was hired as the District's Director of Operations, the third ranking position in the District, which position had been vacant since the new Superintendent had been hired (JA341, ¶ 7). As part of his duties, Brawer was placed in charge of reviewing and improving the after-hours permit application process (JA341-42, ¶7). Brawer discovered that many principals in the District were unfamiliar with the requirements of State law and the SOPM regarding after-hours activities, and that there was no single high-ranking person in the district with a thorough knowledge of the requirements of the SOPM (JA344, ¶18).

Beginning in December 1994, and continuing to the present, Brawer has personally reviewed each permit application for after-hours use of school buildings in the District (JA344, ¶20). No permit application will be approved if it is incomplete or if it is for a purpose not permitted by the SOPM (JA345, ¶¶21-22). If an application is incomplete, the application is returned to the school (JA345, ¶21). If the application is for an impermissible use, the application is denied with a letter informing the school and the applicant of the reasons for the rejection (JA345, ¶22). These letters help keep the District's principals informed about the requirements of the SOPM (JA345, ¶22).

In addition, in March 1995, Brawer sent a memorandum to all the principals and custodians in the District reminding them of the provision in the SOPM prohibiting the

use of school facilities for religious worship services (JA353). The memorandum stated that a principal should inform Brawer if he or she learns that any organization was improperly using their facilities for religious worship services. Id. A copy of SOPM 5.9, which sets forth the relevant prohibition, was attached to the memorandum (JA353-54).

The procedures implemented by the District were designed to ensure that no permit will be granted for a use that is not permitted by the SOPM, including, but not limited to, church worship services (JA346, ¶25). Since the procedures were implemented in 1995, there have been no church worship services held in the facilities of the District (JA346, ¶26).

This Action

The Church commenced this action in October 1994, asserting that the District's denial of its permit applications violated the Church members' rights under the Free Speech, Free Exercise, Free Assembly and Establishment Clauses of the First Amendment, the Equal Protection and Due Process Clauses of the Fourteenth Amendment and the Religious Freedom Restoration Act. In April 1996, the Church moved for summary judgment. The District cross-moved for summary judgment, arguing that Education 414 and the Board's operating procedure were constitutional under this Court's recent decision in Bronx Household of Faith v. Community School District No. 10, 127 F.3d 207 (2d Cir. 1997), cert. denied, 118 S. Ct. 1517 (1998).

District Court Decision

In its well-reasoned decision (App. 3a-25a), the District Court rejected the Church's constitutional and statutory claims.

In reliance upon the Second Circuit's decision in Bronx Household, the District Court held that under Education Law section 414 and the Board's operating procedures, P.S. 105 was a "limited public forum" closed to all unspecified uses and excluded uses (App. 16a). In accordance with Bronx Household, the District Court held that the exclusion of worship services from this limited forum was reasonable (App. 22a).

With respect to the Church's argument that the District had opened its facilities to religious worship services by other groups, the District Court found that the District had not inadvertently created an open forum (App. 18a-22a). The Court stressed that the prior permits were "granted by an individual who failed to properly implement the district's clear policy against such use, and [that] the district promptly corrected these errors and took effective steps to prevent such a mistake in the future" (App. 22a).

The District Court also rejected the Church's claims under the Free Exercise Clause, the Establishment Clause, the Equal Protection Clause, and the Religious Freedom Restoration Act as being identical to those rejected in Bronx Household (App. 25a).

Court of Appeals Decision

In a one sentence per curiam decision, the Second Circuit unanimously affirmed the judgment of the District Court "for substantially the reasons stated by Judge Haight in the decision below" 164 F.3d 829 (2d Cir. 1999) (App. 1a-2a).

REASONS FOR DENYING THE WRIT

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE SECOND CIRCUIT WAS CORRECT IN AFFIRMING THE HOLDING OF THE DISTRICT COURT THAT PUBLIC SCHOOL 105 WAS A LIMITED PUBLIC FORUM, AND THAT THE EXCLUSION OF RELIGIOUS WORSHIP SERVICES FROM THAT FORUM WAS REASONABLE AND VIEWPOINT NEUTRAL.

The writ should be denied because the Court of Appeals correctly applied the teachings of this Court when it affirmed the holding of the District Court that P.S. 105 was a limited public forum and that the exclusion of religious worship services from that forum was reasonable and viewpoint neutral.

A. Public School 105 is, at Most, A "Limited Public Forum" Which Has Not Been Opened to Religious Worship Services.

The Church contends that Education Law section 414 and the Board's operating procedures, which implement section 414, violate the Church's First Amendment right to free speech by prohibiting it from leasing a public school building to conduct weekly religious worship services. Where a party claims that its right to free speech on public property has been violated, the first inquiry is whether the public property in question is: (1) a traditional public forum; (2) a designated public forum, either limited or not limited; or (3) a nonpublic forum. International Society for Krishna Consciousness v. Lee, 505 U.S. 672, 678-79 (1992).

A "traditional public forum" is "government property that has traditionally been available for public expression" such as parks and streets. Krishna Consciousness, 505 U.S. at 678. Regulations of speech on such property are "subject to the highest scrutiny" and "survive only if they are narrowly drawn to achieve a compelling state interest." Id.

A "designated public forum," is property that the State has opened for expressive activity by part or all of the public and either for all or certain subject matters. Id. A "designated forum" may be "limited" or "unlimited." Id. Where the designated forum permits unlimited speech for a specific group of people, the forum is treated like a traditional forum, where any restriction must be narrowly drawn to achieve a compelling state interest. Widmar v. Vincent, 454 U.S. 263 (1981). Where the designated forum is "limited," restrictions as to subject matter need only be "reasonable and viewpoint neutral." Rosenberger v. Rector Visitors of University of Virginia, 515 U.S. 819, 829 (1995) (with a limited designated forum "[t]he State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum' . . . nor may it discriminate against speech on the basis of its viewpoint").

All other public property falls into the category of "nonpublic forum" where a government's regulation of expressive activity "need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." Krishna Consciousness, 505 U.S. at 679.

This Court has recognized that a public school is not a traditional public forum. A school district, "like a private owner of property, may legally preserve the property under its

control for the use to which it is dedicated." Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 390 (1993). In Lamb's Chapel, this Court determined that "[c]ontrol over access" to a public school that has not been designated an open forum "can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and viewpoint neutral.'" Id. at 392-93.

To succeed in its First Amendment claim, the Church must establish that New York State's access policy has created a either designated open forum or a limited public forum encompassing religious worship services. Section 414, on its face, does not create an open forum. By enumerating a list of permissible uses, the statute evinces a purpose to exclude all non-listed purposes. As this Court held in Cornelius v. NAACP Defense & Ed. Fund, Inc., 473 U.S. 788, 802 (1985), the "government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse."

Nor does section 414 create a limited public forum open to religious worship services. See Trietley v. Board of Educ., 65 AD2d 1 (4th Dep't 1978). Section 414, first enacted in 1910, sets forth ten categories of uses which are permitted on school property. In addition to religious worship services, numerous other possible uses are not listed in the statute, including political meetings, commercial uses, labor union meetings, and the meetings of fraternal organizations, such as the Elks or Lions.

B. The School District Has Not Created an Open Forum Either Through the Board's Operating Procedures nor Through the District's Prior Practices

The Church studiously avoids arguing that the District allowed P.S. 105 to become an open forum through the District's past practices, even though that was the crux of its argument to the District Court and the Second Circuit and was the focal point of the District Court's discussion. Presumably the Church abandons this argument because it wants this Court to address the "pure" legal issue whether a school district may exclude religious worship services, rather than the fact-specific inquiry of whether this particular school district effectively closed its forum to religious worship services after inadvertently permitting several religious uses.

By not raising in its petition for certiorari the issue of prior religious uses, the Church has waived any arguments that such prior uses opened the forum to all religious worship services. In any event, as the District Court and the Second Circuit correctly found, once the District discovered that religious worship services had occurred inadvertently on school property, it took all necessarily steps to close the forum to future worship services (22a).

C. The Second Circuit's Decision in this Case is Not in Conflict with Any Prior Decision of this Court or any other Federal Court.

The Church errs when it argues that the Second Circuit's decision in this case conflicts with prior decisions of this Court and seven federal Circuit Courts of Appeal (Pet. at 9-11). The Church relies primarily on Widmar v. Vincent in

which the issue presented was the right of college students to meet for religious worship services on their own university campus. In contrast to the restriction-laden policy at issue here, the university in Widmar had created a truly open forum in which any legitimate student group was permitted to meet. See Chess v. Widmar, 635 F.2d 1310, 1312 (8th Cir. 1980), aff'd sub nom., Widmar v. Vincent, 454 U.S. 263 (1981). Indeed, this Court characterized the university campus in Widmar as a "public forum." 454 U.S. at 270.

The Second Circuit in a prior decision upholding the exclusion of religious worship services in the public schools, Deeper Life Christian Fellowship, Inc. v. Board of Education, 852 F.2d 676, 679 (2d Cir. 1988), correctly distinguished the Widmar decision:

> Widmar, however, does not control the result here. As the Supreme Court pointed out in a later case, in Widmar it had "noted that a university campus, at least as to its students, possesses many of the characteristics of a traditional public forum," Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 803 . . . (1985), thereby subjecting attempts at regulating use of the property to the most exacting constitutional standards as to the forum's intended beneficiaries.

In reliance on footnote 6 in the Widmar decision, the Church also argues that religious worship services must be permitted wherever "religious speech" is allowed because, they argue, there is no distinction between the two (Pet. at 14). The problem with this argument is that it would open all limited public forums to religious worship services. Under

Lamb's Chapel and Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995), a government which has opened a forum to speech on a particular subject-matter from a secular viewpoint, must also open the forum to speech on the same topic from a religious viewpoint. The Church argues that the forum must then be opened to religious worship services as well.

The absurdity of the Church's argument is demonstrated by an example: Once an elementary school invites a speaker to discuss any topic imaginable, for example, teen smoking, the school is required, under Lamb's Chapel, also to permit a discussion of the subject from a religious viewpoint. Under the Church's faulty syllogism, the school would then be obligated to permit outside groups to conduct religious worship services on school grounds because of the purported inability of a school district or court to distinguish between a discussion of teen smoking from a religious viewpoint and a religious worship service.

While the Second Circuit's decision may result in school districts and courts having to make difficult distinctions between religious worship services and other forms of religious speech, the special status given to religion and religious organizations by the Constitution and various federal and state laws render such line-drawing inevitable. For example, section 107 of the Tax Code, which exempts the rental value of a parsonage from a "minister of the gospel's" gross income, has required federal courts to examine whether a particular member of the clergy is performing religious worship services. Tanenbaum v. C.I.R., 58 T.C. 1 (1972) (holding that a rabbi employed by the American Jewish Committee was not entitled

to the section 107 exemption because he did not perform "any sacerdotal duties or conduct religious worship").[2]

Such line drawing arises in other contexts as well. For example, it is well-accepted that public school students may discuss religious materials from a historical or literary perspective, Abington School District v. Schempp, 374 U.S. 203, 300 (1963) (Brennan, J., concurring), or perform religious music, such as a Mozart requiem, at a school concert. On the other hand, it is also undisputed that public school students may not be subjected to state-sponsored prayer. Surely, the Church cannot seriously argue that discussions of religious material and the performance of religious music must be banished from the public schools because of the theoretical difficulty in drawing lines between such activities and religious worship services.

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[2] One may also note that Congress frequently provides that money earmarked for such purposes as education grants, facilities for the elderly, and child care block grants may not be used for programs involving religious worship or instruction. See, e.g., 20 U.S.C. § 1069c (certain grants to higher education institutions "may not be used . . . for . . . any religious worship or sectarian activity."); 42 U.S.C. § 3027(a)(14)(A)(iv) (requiring states seeking federal aid for construction of centers for the elderly to submit plans providing assurances that "the facilit[ies] will not be used and [are] not intended to be used for sectarian instruction or as . . . . place[s] for religious worship")' 42 U.S.C. § 9858k(a) (no child care or development block grants "shall be expended for any sectarian purpose or activity, including sectarian worship or instruction.").

In any event, the facts of this case do not remotely approach any difficult boundary: The Church wishes to use the school as its house of worship. Absent evidence that the School District excluded the Church from expressing its views in the context of activities permitted within the limited public forum, the Church's claim must fail.

The Second Circuit's decision is also not in conflict with the other Circuit Court decisions cited by the Church (Pet. at 9-11).

For example, in Gregoire v. Centennial School District, 907 F.2d 1366 (3rd Cir. 1990), cert. denied, 498 U.S. 899 (1990), the Third Circuit struck down a policy excluding religious speech in the evening at public schools only because the policy also allowed religious speech in the afternoon. 907 F.2d at 1379.

Similarly, in Fairfax Covenant Church v. Fairfax County School Board, 17 F.3d 703 (4th Cir. 1994), cert. denied, 511 U.S. 1143 (1994), the Fourth Circuit struck down a policy under which the schools charged religious groups a higher rental fee than non-religious groups.

In Grace Bible Fellowship v. Maine School Admin. District No. 5, 941 F.2d 45 (1st Cir. 1991), the First Circuit struck down the practice of excluding, not religious services, but, instead, the use of the public school facilities by religious groups. The actual practice of the District prohibited religious groups from conducting the same activity (in that case, a community dinner) that a secular group would have been allowed to conduct.

Likewise, in Good News/Good Sports Club v. School Dist. of City of Ladue, 28 F.3d 1501 (8th Cir. 1994), cert. denied, 515 U.S. 1173 (1995), the policy found unconstitutional banned after-school groups from engaging in "any speech or activity involving religious or religious belief." Again, this overbroad restriction was plainly at odds with the teaching of Lamb's Chapel.

And the Tenth Circuit's decision in Church of the Rock v. City of Albuquerque, 84 F.3d 1273 (10th Cir.), cert. denied, 519 U.S. 949 (1996), the Court found that the City could not bar religious speech -- not religious worship services -- in publicly owned senior centers, because the senior centers had been designated public fora for lectures on any subject matter of interest to senior citizens.

In Concerned Women for America v. Lafayette County, 883 F.2d 32 (5th Cir. 1989), the Fifth Circuit correctly recognized that a public library's policy governing the use of its auditorium created a limited forum, but incorrectly applied the "compelling state interest" test in striking down the policy at issue. In light of this Court's subsequent decisions in Lamb's Chapel and Rosenberger, holding that such policies should be evaluated under a "reasonableness" test, the Fifth Circuit's decision in Concerned Women can no longer be considered good law.

Finally, there is nothing in any of the Seventh Circuit cases cited by petitioner remotely relevant to the issue of whether a church may conduct worship services on school property. See Grossbaum v. Indiannapolis-Marion County Building Auth., 63 F.3d 581 (7th Cir. 1995); Community Unit School Dist. No. 18, 9 F.3d 1295 (7th Cir. 1993); Muller v. Jefferson Lighthouse School, 98 F.3d 1530 (7th Cir. 1996).

D. The Exclusion of Religious Worship Services from Section 414's Enumeration of Authorized Uses of Public School Facilities is Reasonable and Viewpoint Neutral.

Once it is established that the school is neither a traditional public forum nor "a designated public forum open for indiscriminate public use," the standard to be applied to a subject matter based exclusion is whether "the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." Lamb's Chapel, 508 U.S. at 392-93. Accord Rosenberger, 515 U.S. at 829.

The exclusion of religious worship services is "reasonable" for the reasons outlined by the Second Circuit in Bronx Household of Faith, and the Church does not argue otherwise. It was reasonable for the State and the school district to seek "to avoid the identification of a [elementary] school with a particular church" and it was reasonable to "consider the effect upon the minds of [elementary] school children of designating their school as a church." 127 F.3d at 214. The State was also "reasonable" in limiting the use of school facilities to those programs which served children, education in general, or groups whose programs were aimed to serve the general public. Id.

Finally, as discussed more fully in subpart E below, the desire to keep the schools from becoming "symbolic[ally] link[ed]" with religion in violation of the concerns embodied in the Establishment Clause is also a legitimate policy reason which justifies the exclusion of religious services from public schools. Agostini v. Felton, 521 U.S. 203, 224 (1997).

E. Assuming, Arguendo, that P.S. 105 is an Open Forum, Compliance with the Establishment Clause is a Compelling State Interest Which Justifies the District's Refusal to Permit the Church to Conduct its Regularly Scheduled Services in that School.

Even if the District could be deemed to have created an open public forum, the exclusion of religious worship services is justified by the compelling state interest of compliance with the Establishment Clause. As a plurality of this Court recognized in Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753 (1995) (plurality opinion), such an interest would justify a content-based restriction on speech in an open forum. Id. at 762:

> There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech.

In Agostini, this Court reaffirmed that the Establishment Clause prohibits a government from "creat[ing] the impression of a 'symbolic union' between church and state." 521 U.S. at 227. The placement of a church in a school building would create more than just the impression of a symbolic union.

The Church sought to conduct religious worship services in a public elementary school on eight consecutive Sundays. However, the natural consequence of the Church's argument would require public schools to rent their facilities for regularly-scheduled church services without limitation. They would also require school districts to house church Sunday schools and even weekday after-school hours parochial education. A church might even ask to post a sign in front of

the school identifying the building as the location of the church, if only to assist guests attending a wedding or funeral. A church might seek to store items related to religious worship on school property. The inevitable result of the acceptance of the Church's argument in this case would be the actual, as well as the symbolic, union of Church and School.

The opening of the public schools to religious worship services would also inevitably result in school districts favoring some denominations over others. While theoretically, different religious groups could use different schools in a given district, in practice, given the number of major religious denominations in this country and given the special needs of some of these groups -- for example, the need to worship in walking distance of the member's homes -- there is no policy that a school district could adopt that would not discriminate against one group or another.[3]

This Court in Rosenberger suggested that a neutral "first-come, first-served" policy might avoid Establishment Clause problems in a given case, 515 U.S. at 843, but such a policy would not work here. If "first-come first-served" had been adopted three centuries ago, every school in New England would house the town's Congregational Church. Discrimination in favor of established sects and against newcomers would be the almost certain outcome of a first-come, first-served policy.

Indeed, any "neutral" policy that would give churches permanent use of public school facilities for regularly

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[3] See F. Mead, Handbook of Denominations in the United States, (8th ed. 1988) (identifying over 232 major religious denominations in the United States).

scheduled worship services would necessarily favor established religions, such as those that conduct services on Saturday and Sunday. Friday sabbath observers would be excluded from the State's largess, based only on the conflict between their religious beliefs and the public school schedule. In addition, established religious groups, because they are already favored with the closing of schools on their major holidays, such as Christmas and Easter would be further favored by the rule urged by the Church in this case. Established religions would be able to celebrate their holidays in subsidized school facilities, while less established religious groups would not.[4]

In Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753 (1995), which involved a challenge to the display of a cross by the Ku Klux Klan in an open forum in front of an Ohio courthouse, five Justices took the view, either explicitly or implicitly, that the Establishment Clause forbids a government practice neutral towards religion which would lead to the "realistic danger that the community would think that the [State] was endorsing religion or any particular creed." 515 U.S. at 772 (O'Connor, Souter and Breyer JJ., concurring); accord 515 U.S. at 787 (Souter, O'Connor and Breyer, JJ., concurring); 515 U.S. at 799 (Stevens, J., dissenting); 515 U.S. at 817-18 (Ginsburg, J., dissenting). While the four Justice plurality wrote that the "community" in question were only those individuals in the community who were aware of the town's policy creating a public forum, 515 U.S. at 765 (Scalia, J., plurality decision), this view appears to have been rejected by a majority of the Justices. Instead,

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[4] For example, in New York City, the Moslem holidays of Idul-Fitr and Idul-Adha are recognized for traffic regulation purposes, see 11 Rules of the City of New York, title 34, § 4-08, but are not public school holidays.

one must look to a reasonable observer in the community as a whole. 515 U.S. at 772-73; 515 U.S. at 787.

Following the majority view, one may conclude that a reasonable observer would view a church's permanent use of a public school facility as the school district's endorsement of that denomination, as well as of religion and religious worship in general.

These Establishment Clause concerns constitute a compelling state interest in maintaining the exclusion of religious worship services from public school buildings. Thus, even under the most exacting standard of review, the District's exclusion of regularly scheduled religious services does not violate the Church's First Amendment free speech rights.

II. SECTION 414 OF THE EDUCATION LAW DOES NOT VIOLATE THE FIRST AMENDMENT GUARANTEE OF FREE EXERCISE OF RELIGION.

The Church also argues that the public schools must be opened to religious worship under the Free Exercise Clause of the First Amendment (Pet. at 15). The Church would have this Court hold that any time a government opened public property to speech on any topic, the refusal to also permit religious worship on that public property would constitute a substantial burden on religious exercise.

New York State's decision not to include religious worship among the activities permitted on public school grounds does not place a substantial burden on the exercise of religion. See Braunfeld v. Brown, Commissioner of Police, 366 U.S. 599, 605-06 (1961) (plurality opinion) ("legislation which does not make unlawful the religious practice itself" is

at most an indirect burden on the exercise of religion). The Church is free to conduct their religious services anywhere else, and is free to conduct secular activities on public school grounds. Thus, this case bears no resemblance to those cited by the Church (Pet. at 15) where the exercise of certain practices by religious groups were outlawed in their entirety. Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (striking down prohibition of animal sacrifice during religious ceremonies); Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) (upholding prohibition on use of peyote during religious ceremonies).

III. SECTION 414 OF THE EDUCATION LAW DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

The threshold question in determining the validity of governmental action challenged as violative of equal protection is the applicable standard of review. Unless a policy creates a classification that operates to disadvantage a suspect class or interferes with the exercise of a fundamental right, a challenged policy will be examined under the rational basis test. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 313-14 (1976).

For the reasons stated elsewhere in this brief, petitioners have not stated a claim under the First Amendment, and, thus, no fundamental right is implicated by the State's exclusion of religious worship services from public elementary schools. Therefore, the rational basis test, not a strict scrutiny analysis, must be applied to petitioner's equal protection claims.

Official action that is challenged as denying equal protection "is presumed to be valid and will be sustained if the classification drawn . . . is rationally related to a legitimate state interest." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985). As the Second Circuit has previously held in Bronx Household of Faith, it was reasonable for the State and the District to seek "to avoid the identification of [an elementary] school with a particular church" and it was reasonable to "consider the effect upon the minds of [elementary] school children of designating their school as a church." 127 F.3d at 214.

IV. SECTION 414 OF THE EDUCATION LAW DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

The Church also argues here that Section 414 violates the Establishment Clause of the First Amendment (Pet. at 16-19). The Church contends that the State's exclusion of religious worship services demonstrates hostility towards religion. As in its Free Speech argument, the Church takes the untenable position that once a public school opens itself to public discussion of any subject matter whatsoever, it must also allow religious worship services.

In evaluating a claim that a statute violates the Establishment Clause, this Court will look, inter alia, to whether the statute has the purpose or effect of "inhibiting religion." Agostini, 521 U.S. at 232-33. The Church has neither argued nor offered proof that the exclusion of religious worship services from the list of permissible uses of public school buildings was intended to inhibit the practice of religion. Moreover, there is no evidence that this prohibition -- in place since 1910 -- has had or will have an adverse effect on religious practice in the State of New York. As the Second

Circuit observed in Bronx Household of Faith, "it is certainly not unreasonable to assume that church services can be undertaken in some place of public assembly other than a public middle school." 127 F.3d at 214.

For these reasons, Education Law § 414 and the School District's operating procedures do not violate the provisions of either the First or Fourteenth Amendment and, thus, were properly upheld by the Second Circuit.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

Respectfully submitted,

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